NO. 2805

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

MICHAEL GEORGE,
Plaintiff in Error

vs

MRS. GEORGE MYERS,
Defendant in Error.

Brief of the Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, DIVISION NUMBER ONE

CHENEY & ZIEGLER,
Attorneys For Defendant in Error.

(The Typer Print)

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STATEMENT OF THE CASE

In the lower court Mrs. George Myers was plaintiff and Micheal George defendant. Plaintiff sued defendant upon two causes of action. The first cause was based upon a claim for services rendered; the second cause was based upon a claim for rent for a store building occupied and used jointly by plaintiff's husband and defendant. This claim was assigned to plaintiff by her husband. Defendant entered a general denial to each cause of action and pleaded a counter claim for money loaned by defendant to plaintiff. There was a trial by jury, verdict returned for $418.35 and judgment upon the verdict for that amount.

It was a simple case, depending entirely upon questions of fact, no questions of law being involved. Although the case involved nothing more than a matter of disputed accounts, it was bitterly contested. It occupied two days for the trial. Counsel for defendant thereafter occupied three days in the argument of a motion for new trial. Counsel for defendant objected to almost every question propounded by Plaintiff's counsel during the trial and took exception to almost every ruling made by the court.

Fifty errors were assigned, P. R. 168 to 178, inclusive. Counsel for plaintiff in error rely upon only fifteen of the errors assigned. In replying to

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counsel's brief we will notice only seven of the fifteen errors relied upon, namely, third, fourth, ninth, eighteenth, nineteenth, twenty-first and twenty-sixth. Errors number thirty-first, thirty-fifth, thirty-sixth, thirty-seventh, forty-sixth, forty-eighth, forty-ninth and fiftieth are so obviously technical, not to say frivolous, that they merit no consideration.

ERRORS DISCUSSED

The Third Error: In the brief for plaintiff in error the following statement is made: "The third error assigned related to the refusal to permit cross examination of plaintiff testifying in her own behalf in regard to the assignment which she testified had been made to her by her husband and which she pleaded had been made for good and valuable consideration." An examination of the record, page 36, does not show that counsel was refused the privilege to examine the plaintiff in regard to the assignment of the rent account. The court sustained an objection to the question as to how much money she paid her husband for the rent account.

Counsel for defendant then asked the witness: "Was the assignment in writing Mrs. Myers?"

The Court: "She doesn't know what assignment means." Counsel did not attempt to question the witness further as to the assignment. He might have called an interpreter to explain his question

and might have asked the witness any questions he desired as to whether or not the assignment was in writing, when, how, and where it was made. He did not choose to do this but seemed at the time perfectly satisfied to let the matter drop.

There is no merit in the error assigned because:

First: Plaintiff based her complaint upon two causes of action. In her first cause she sued for $317.50, with interest at eight per cent. per annum from December 21st, 1911, for services performed for the defendant; her second cause was based upon an account due for rent amounting to $345.00, with interest at eight per cent. thereon from December 21st, 1911, P. R. 1-2-3. Plaintiff recovered upon her first cause of action only; the verdict of the jury was for $317.50, with interest at eight per cent. per annum from December 21st, 1911, to the date of the verdict, viz: December 10th, 1915, the amount of the verdict being $418.35 (see affidavit of jurors P. R. 161). The affidavit of the jurors shows that they found in favor of the plaintiff on her first cause of action for services rendered; that they found in favor of the defendant on the second cause of action which was for the rent; that they found in favor of the plaintiff on the counterclaim pleaded in the defendant's answer. The jury could not under the evidence have

returned a verdict for the sum of $418.35 in any other view of the case. As defendant was successful as to the second cause of action for the rent, he can not now be heard to complain of any errors alleged to have been committed by the court in the admission or rejection of evidence upon that cause of action.

All of the errors relied upon and discussed by counsel in their brief, excepting the twenty-first, twenty-sixth, thirty-first, thirty-seventh, forty-sixth, forty-eighth, forty-ninth and fiftieth, relate to the second cause of action for the rent.

Second: Even if counsel should contend that the jury found for the plaintiff upon the cause of action for the rent, which cause was assigned to her by her husband, nevertheless the judgment should not be reversed.

In an action by an assignee against the debtor he need not aver consideration for the assignment (5 *Corpus Juris* Pg. 1010 Sec. 230).

Welch vs. Mayer, 36 Pac. 613.

Nor is it necessary to set out the consideration for the assignment (5 *Corpus Juris* Pg. 1010 Sec. 230). An assignee of a chose in action may maintain an action in his own name though he pays no consideration therefor.

King vs. Miller, 53 Ore. 53; 97 Pac. 542.

5 *Corpus Juris* 994 Sec. 199.

It has been held that even though the plaintiff fails to plead an assignment but offers evidence of the assignment, the defect in the pleading is cured by the verdict.

Lassiter et al, vs. Jackman, 88 Ind. 118.
Webster et al, vs. Williams, 37 N. W. 62.
Haviland vs. Johnson, 139 Pac. 720.

In the case at bar the assignment was properly pleaded; there was evidence to support the pleading and the jury found a general verdict in favor of the plaintiff. It is said in 5 *Corpus Juris* Pg. 1021 Sec. 265, "Verdict and findings. A Finding in accordance with the allegations of the complaint is sufficient to establish an assignment where the facts constituting an assignment are stated in the complaint."

In the case of Haviland vs. Johnson, supra, decided by the Supreme Court of Oregon, March 17th, 1914, the following language was used by Justice Bean: "Objection is made that the court allowed evidence of the assignment of the chose in action for collection under an averment that it was assigned for valuable consideration. An assignment of a claim for the purpose of collection is based upon a valuable consideration and is sufficient. Defendant was not thereby prevented from making any defense that he could have made had Eisman (the assignor) brought the action in his

own name. Eisman was a witness in the case and is bound by the judgment.' "

This was a suit brought by Haviland vs. Johnson upon an account assigned to the plaintiff by one Eisman. In the case at bar the only interest Michael George, the defendant, could have in the assignment of the rent account by Mr. Myers to the plaintiff was in knowing that he would be protected against a second suit upon the same account by Mr. Myers. Myers having testified for his wife at the trial certainly acquiesed in the assignment and is bound by the judgment. Mrs. Myers testified that he had assigned the account to her for the purpose of collection in this suit. See stipulation as follows.

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MRS. GEORGE MYERS,
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STIPULATION

IT IS HEREBY STIPULATED AND AGREED between Gunnison & Robertson, attorneys for plaintiff in error and Cheney & Ziegler, attorneys for defendant in error, that the testimony of Mrs. George Myers as taken down and transcribed by Mrs. L. A. Green, the official

court reporter, who reported the case, reads as follows:

Q. Did Mr. Myers assign this account over to you to put in this case?

A. Yes.

Q. This account for rent?

A. Yes.

Mr. Cheney: That is all.

IT IS FURTHER STIPULATED that the foregoing testimony shall be substituted in the place of the statement found at the bottom of page thirty-two of the P. R., which reads as follows:

"Mr. Myers assigned over to me this account for rent in this case.

GUNNISON & ROBERTSON,
Attorneys for Plaintiff in Error.
CHENEY & ZIEGLER,
Attorneys for Defendant in Error.

Original stipulation filed.

There can be no doubt that the judgment, even if Mrs. Myers, the plaintiff, had obtained judgment on the assigned account, would have been an ample protection against a second suit by the assignor. Plaintiff in error does not claim that the assignment was not bona fide and valid but his counsel insist that they should have been permitted to question the plaintiff as to how much she paid her husband for the account. It is im-

material whether she paid him anything at all for the account.

The Alaska Statute provides that every action should be prosecuted in the name of the real party in interest. If plaintiff in error had desired to raise the question as to whether there was a valid assignment, it was incumbent upon him to raise it by answer, setting forth therein that the plaintiff was not the real party in interest.

The Fourth Error: This error is based upon the ruling of the court sustaining the objection to the following question:

Q. "About the rent in there, did your husband write about the rent too?" At the time this question was asked the witness, page two of the book which contained the rent account had not been put in evidence, had not been identified, nor had she been questioned about it. All of Mrs. Myers' testimony as to the entries in the book had been confined to the entries concerning the services which she had performed for the defendant.

P. R. 31 she said, "That is the book I had my husband put it down when he paid *because of the work* that is all, I charged him $15.00. He say, 'You do the work for me and I pay you what it is worth' and I charged him $15.00 a month and he never paid me anything except what is in the book, $72.50."

Counsel for plaintiff in error have attempted to make it appear that Mrs. Myers was speaking of the entries on page 3 concerning the rent account. If counsel had desired to convince the Appelate Court of the correctness of their contention they should have printed that portion of the testimony in questions and answers instead of narrative form. The most that could possibly be said in their favor is that it is doubtful on account of the questions being left out of the record as to whether or not Mrs. Myers referred to the account for services or to the account for rent.

However, continuing the testimony of Mrs. Myers on page 36 where the questions are omitted it does appear that the only statement made by the witness regarding the rent was as follows: "My husband wrote in the book about the rent." It is perfectly apparent that there should have been a period after the word, "rent" because the rest of the testimony following the word shows that she was speaking of her account for services rendered. She says, page 36, "That is the work I am talking about." All of the testimony shows that nothing was ever paid to Mrs. Myers upon the rent account but defendant did pay her the sum of $72.50 upon her account for services and those payments, she had her husband enter in the book.

The cross examination should be limited to the matters brought out in direct examination.

We beg to cite counsel's authorities cited in their brief under the head of the thirty-sixth error, pages 55 and 56. Mrs. Myers had not testified nor had she been questioned concerning page 3 of the book which contained the entries regarding the rent account. The question was not proper cross examination.

Counsel for plaintiff in error had ample opportunity to question Mrs. Myers further when she was recalled in rebuttal and after the book had been introduced in evidence.

And, further, as plaintiff did not recover on her rent account, the error, if error it was, was harmless.

The Ninth Error: This error is predicated upon the refusal of the court to require the witness, George Myers, to read the items in the book which were written in the Assyrian language and translate them into the English language. P. R. 53, shows that the court refused to compel the witness, George Myers, to read the items and translate them into English.

The court did not refuse to allow counsel for plaintiff in error to have the items translated by anyone capable of making the translation. That the court was justified in refusing to compel the witness, George Myers, to translate the writing is clearly shown not only because the witness had said he could not translate the items, P. R. 53, but

because the court on direct examination had tried the experiment which resulted in failure.

At the bottom of page 44, P. R., the court said: "If the jury and the court can not understand the rest of the testimony any more than they understand that, we will have to have an interpreter."

Referring to P. R. beginning on page 38, to and inclusive of page 47, it will be seen that George Myers could not translate the writing into English and that after laboring with the witness for a long time it became necessary to call in an interpreter. The interpreter then read and translated the items. When Mr. Robertson again tried to compel the witness to translate, evidently the court did not feel like wasting more of its valuable time by experimenting with the witness.

Plaintiff in error could have called an interpreter if he really desired to have the items translated. The record shows that George Myers could neither read nor write the English language, that he could not translate the Assyrian language into the English language.

It would seem that a judge who has patiently labored for two days over a little, simple case such as this and especially where the witnesses are nearly all either Assyrians or Indians, ought to be permitted to exercise his own good judgment in regulating the proceedings.

Counsel argues in support of this error that the court erred in stating, "The whole thing is incompetent, irrelevant and immaterial at this time because all that he has done is simply that this man has identified that page; he simply says that this is his writing." The court, no doubt, had a right to rule that counsel should call an interpreter. The reasons stated by the court for the ruling are immaterial if the court was right in rejecting the question.

"An assignment of erroneous reasons for rejecting evidence is not sufficient to authorize reversal of judgment if such ruling may be upheld on other grounds."

Selsby vs. Foote 14 How. U. S. 218
14 Law Ed. 218-221.
3 Cyc. 222.

Plaintiff did not recover on the rent account, therefore defendant was not injured.

The Eighteenth Error: This error is based on the refusal of the court to sustain an objection to the following question:

Q. "Now what I want to get at, what do you mean by the word 'settling'—do you mean they pay afterwards; was there anything more said about them settling—?"

By reference to page 63, P. R., it will appear that the objection was made before the question was completed. It is impossible to determine

what the rest of the question migh have contained.

It is sufficient answer to counsel's argument under this assignment to refer to the fact that the witness was an Assyrian, that his tesimony was almost unintelligible, not because he could not speak English but because he could not make himself clear. The transactions between these people regarding their business affairs were very much mixed and difficult for a foreigner to explain and more difficult for another to understand. Leading questions are usually allowed under circumstances such as these. Defendant could not be injured as no recovery was had for rent.

The Nineteeth Error: Counsel complains of the ruling of the court in sustaining an objection to the following question:

Q. "Louis, in that case you were talking about a moment ago in the Commissioner's Court, wasn't George Myers asked whether or not Mike George owed him any money?" Counsel says, "The question was intended to elicit admission against interest made by plaintiff's privy."

It appears from the printed record that George Myers himself testified before the witness, Louis Saloum. The question asked might have been competent in the cross examination of George Myers but it was not competent for counsel to ask Louis Saloum what George Myers had been asked in some other court regarding an entirely differ-

ent case. What Myers had been asked could never be material, what he answered, might be. The question evidently concerned the account for rent upon which issue, as before stated, the palintiff in error was successful.

The Twenty-First Error: Under this assignment plaintiff in error was asked the following questions:

Q. "At the time of that fire there were two of her children burned?"

A. "Yes sir."

Mr. Robertson: "We object to that as immaterial."

Q. "And didn't it make any impression on your mind so you can tell the jury when that happened? Those two children and lots of the goods that were in the building lost, and still you don't remember when that fire occurred."

Mr. Robertson: "We object to that as argumentative."

The P. R., page 70, shows that the first quesion was answered before the objection was made. Counsel did not move to have the answer stricken. Not having moved to strike the answer, counsel can not now complain.

The second objection was based upon the ground that it was argumentative; surely such an objection is not tenable.

The whole record in this case shows that the

date of the fire was very important; it was important for the plaintiff in error fixing the time when he claimed he had ceased to board and room with the defendant in error.

In the cross examination of Mrs. Myers, P. R. 33-34 and 35, it appears that counsel for plaintiff in error questioned Mrs. Myers three or four different times regarding the fire. On page 33 she testified, "He slept in the kitchen until the house burned down when he moved down stairs." At the bottom of page 34, she testified "And he slept in the kitchen all the time until the house burned." On page 35 near the top, she testified, "The store belonged to me and the up-stairs burned and left the down stairs and Mike slept in a room next to the store and we moved across the street."

Counsel for plaintiff in error evidently thought the date of the fire was a very important matter, still he objects because counsel for defendant in error alluded to the fact of the children being burned and the loss of a stock of goods, in attempting to fix the date of the fire. This objection is sufficiently answered by the court in its decision on the motion for a new trial. P. R. 10.

The Twenty-Sixth Error: The question was: Q. "Do you know anything about a case that Mike George is interested in with Mrs. George Myers entitled W. G. Hills vs. Mrs. George Myers?" P. R. 87.

The witness, George Maloof, had testified, P.

R. 87, "I have been a witness for Mike several times before in the Commissioner's Court. He couldn't lose a case where I was a witness."

The question was only preliminary, as stated by counsel for defendant in error. As the question was not answered, it could not have resulted in injury to the plaintiff in error.

ARGUMENT

Replying to counsel's brief on the questions:

First: That the verdict is not supported by the evidence;

Second: That the evidence discloses that the verdict is contrary to and against the weight of the evidence;

Third: That the plaintiff in error is entitled to a new trial on the ground of newly discovered evidence.

We have little to add to the decision of the lower court found in the P. R. page 10.

The court in its decision, P. R. page 12, says: "Plaintiff had witnesses as to the truth of all the material allegations of her complaint and the defendant had witnesses denying the truth of those allegations, and all said testimony went to the jury: it was a simple case, there was nothing in it but the credibility of witnesses."

In this connection it must be borne in mind that all the parties interested in the suit were

Assyrians and that all of the witnesses who testified in the case were either Assyrians or Indians, with the exception of four, the four exceptions being Anderson, Bothwell, Witsell and Hubbard. Neither Bothwell nor Hubbard testified regarding the first cause of action.

The Assyrians were all related to each other: the Myers family and the George family had been in business together for a number of years and were acquainted in the Old Country. Few of them could read or write and none of them spoke the English language fluently.

It was a case where leading questions were necessary to elicit the facts. It would be too much to expect that counsel for either side should be confined to the strict rules of procedure in this respect. An examination of the record will show that counsel for plaintiff in error objected to almost every question propounded by counsel for defendant in error throughout the whole course of the trial. This is shown in all parts of the record where it is printed in questions and answers.

It would appear that counsel for plaintiff in error were more intent upon securing some ruling from the court upon which they could base an error than they were in eliciting the facts of the controversy from the witnesses. This is especially apparent in the first error assigned, being number three, where counsel asked the witness, Mrs. Myers, concerning the assignment. The court

stated that she did not understand what the word "assignment" meant. Counsel immediately took exception without attempting to pursue the matter any further. He had an opportunity to call an interpreter if he so desired but it seemed that he was more anxious to stand upon his objection than he was to call an interpreter and proceed with his questions.

The character of the objections made by counsel for plaintiff in error appear from examination of pages 118 to 125, of the P. R. We call the court's particular attention to these pages of the record.

We believe that no substantial error has been committed by the court in the trial of this case and respectfully pray that the judgment be affirmed.

Respectfully submitted,

Attorneys for Defendant in Error.

Copy Received and Service Admitted this.....

Day of November, A. D., 1916.

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Attorneys For Plaintiff in Error.